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In the Supreme Court of the United States

OCTOBER TERM, 1994

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

CHICKASAW NATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

DAVID HUDSON
General Counsel
DAVID ALLEN MILEY
Assistant General Counsel
Oklahoma Tax Commission
Post Office Box 53248
Oklahoma City, OK 73152
(415) 521-3141

CHARLES ROTHFELD*
GARY A. WINTERS
Mayer, Brown & Platt
Suite 6500
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 788-0616

* *Counsel of Record*

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PETITIONER'S REPLY BRIEF

Respondent asserts that this case involves nothing more than narrow issues of state law and treaty interpretation. But the Tribe is able to make this argument only by disregarding the first and principal issue presented in the petition: whether *federal* law precludes state taxation of sales by Indians to non-Indians that impose substantial burdens on the State. Respondent plainly is wrong in contending (Br. in Opp. 7) that the resolution of this question is in any sense dependent on "review of the factbound incidence-of-the-fuel tax question" (as the Tribe characterizes the petition's *second* question); to the contrary, the first question presented in the petition *assumes* that the legal incidence of the fuel tax falls on the *Indian retailer*. The question whether such a tax may be validly imposed is of great importance to States, to Indian tribes, and (as the *amicus* brief filed by the Petroleum Marketers

Association of America ("PMAA") demonstrates) to the business competitors of Indians across the nation. Indeed, the contention that this case lacks significance is belied by the extraordinary filing of two *amicus* brief *opposing* certiorari, which suggests that those belittling the importance of the holding below protest entirely too much.

Respondent *acknowledges* that the decision below holds the validity of a state tax to turn entirely on the levy's nomenclature. The Tribe does not deny (or, for that matter, make any response at all to) our submission that such a holding is flatly inconsistent with this Court's decisions. And respondent does not take issue with our observation that the court of appeals' decision will foment litigation, disrupt state tax administration, and lead to substantial drains on state revenues. Because that holding imposes extraordinary restrictions on state taxing authority, provides tribes with a blueprint for obtaining tax exemptions for their commercial activity, and departs from decisions of this Court, further review is warranted.

A. An Otherwise Permissible Tax is Not Rendered Invalid Simply Because Its Legal Incidence Falls on an Indian Tribe

1. Given respondent's myopic focus on state law, the undisputed nature of the *federal* holding below bears emphasis. As we explain in the petition (at 8, 13) and as respondent evidently recognizes, the economic burden of the fuel tax falls on purchasers who are *non-Indians* or *non-members* of the Tribe; the State undeniably could impose the tax directly upon those purchasers and could require the Tribe to collect the levy; the fuel is used in large measure outside of Indian country; and the tax is used to defray costs that are imposed upon the State — and *not* upon respondent — by the use of that fuel. Respondent takes issue with *none* of this.[1] The court below nevertheless invalidated the tax for the sole

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[1] Pointing to the use of federal funds to construct roads in Indian country, *amici* Muscogee (Creek) Nation (at Br. 12-13) and Cherokee Nation (at Br. 8-9) — but not respondent — challenge our statement of the issue. In fact, the record in this case reflects, as the district court found and as respondent does *not* deny, that "*the Tribe* does not construct or

reason that the legal incidence of the levy falls upon the Tribe. Respondent (in the brief portion of its submission directed to the first question presented in the petition) defends that holding as a proper application of "a *per se* rule forbidding direct state taxation of Indian tribes regarding their Indian country activities." Br. in Opp. 7, 24. But that argument cannot be reconciled with this Court's decisions.

2. At the outset, we note that respondent is simply incorrect in contending (Br. in Opp. 24) that the Court has never tolerated a direct state tax on an Indian tribe. As we explained in the petition (at 13), the Court has expressly declared the rule against state taxation of tribes inapplicable in the *very* situation presented here, explaining that its holdings invalidating state levies on Indian income did not address claims "that the State could not tax that portion of the receipts attributable to on-reservation sales to non-Indians." *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 482 (1976).[2] We also explained in the petition (at 15-

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maintain roads and highways for the use of the general public in Oklahoma." Pet. App. 37a (emphasis added). The district court also found, and respondent again does *not* dispute, that the fuel subject to tax, which is sold in stores catering to the general public, "is used almost exclusively off of Indian country *on state jurisdiction roads*." *Id.* at 36a (emphasis added). It therefore is inarguable that the sale and use of the fuel imposes substantial burdens on the State, and no burden at all on the Tribe. This conclusion is not significantly changed even if the federal expenditures are viewed as relevant. *Amicus* Cherokee Nation reports (at Br. 8) that the Federal Government has allotted less than $18 million to Indian reservation road construction in Oklahoma in 1994. In contrast, the state fuel tax produces more than $300 million annually, at least 90% of which is devoted to road construction and maintenance. See Pet. 2-3. The relative extent of the burden imposed upon the State is manifest.

[2] As we explained in the petition (at 13 n.6), the Court in *Moe* was referring specifically to *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U.S. 685 (1965), where an on-reservation Indian trader — who bore the legal incidence of the tax — failed even to challenge the portion of a gross income tax falling on the proceeds of sales to non-Indians. And as respondent itself acknowledges (Br. in Opp. 15 n.10), "'Indian trader' cases * * * furnish analogous precedent" for cases

16) that the Court has held the rationale of the rule barring direct state taxation of tribes to have no application where, as here, the tax falls upon activities that have "a significant impact beyond the limits of" Indian country. *Rice* v. *Rehner*, 463 U.S. 713, 724 (1983). In doing so, the Court has expressly distinguished the very cases relied upon by respondent, explaining that such "'spillover' effect[s] [are] qualitatively different from any 'spillover' effect of income taxes or taxes on cigarettes." *Ibid.* (citation omitted). Respondent — which cannot contest the significant "spillover" effect of its fuel sales (see Pet. 15) — does *not* deny the relevance of, and makes *no* attempt to explain away, this authority.

Respondent also is wrong in asserting that our submission asks the Court to revisit prior holdings (see Br. in Opp. 7) or would limit the preemption of state taxes to those on Indian property or income. *Id.* at 22. To the contrary, we recognized in the petition (at 11-12 & n.5) that the Court repeatedly has invalidated a range of state taxes whose legal and economic incidence fell on tribal activities taking place in Indian country — taxes that necessarily interfered with the mechanisms of tribal self-government. But as we explained in the petition (and as respondent rather elliptically acknowledges, see Br. in Opp. 22), the Court consistently has stated this rule *not* as an absolute, but rather as a *presumption* under which Indian tribes *generally* are immune from state taxation. See Pet. 12 (quoting *Oklahoma Tax Comm'n* v. *Sac and Fox Nation*, 113 S. Ct. 1988 (1993); *Montana* v. *Blackfeet Tribe*, 471 U.S. 759 (1985); *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980); *Duro* v. *Reina*, 495 U.S. 676 (1990); *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973)). Respondent's argument to the contrary rests entirely on *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1985), where the Court alluded in a footnote to "a *per se* rule" making it "unnecessary to rebalance these [state and tribal] interests in every case." *Id.* at 215 n.17. As we explained in the petition (at 13), however — and as respondent again does not deny — *Cabazon Band* did not involve state taxation at all, did not address the issue

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involving taxes on Indians.

presented here, and therefore cannot fairly be read as requiring preemption in the circumstances of this case.[3]

In fact, respondent fails to offer any support at all for its proposed rule. We explained in the petition (at 13) that the Court *never* has invalidated a state tax in the circumstances of this case, where the economic burden of the levy falls on non-Indian purchasers who could themselves be subjected to tax, and when the levy "is directed at off-reservation value where the taxpayer is receiving State services" (Pet. App. 37a); respondent does *not* take issue with that proposition. In this setting, respondent plainly is wrong in asserting (Br. in Opp. 7, 24) that congressional silence somehow represents an endorsement of its position. And respondent offers no rationale for invalidating a tax that — unlike those that have been struck down by the Court (see Pet. 12, 14-15) — does not remotely interfere with the mechanisms of tribal government.

3. For a variety of reasons, respondent also is wrong in asserting that the decision below lacks significance because the Oklahoma legislature could save the challenged tax with "a stroke of the pen" by declaring its legal incidence to be on the consumer. Br. in Opp. 7; *id.* at 24-25. *First*, this argument expressly recognizes that the holding below turns entirely on a semantic formalism. But as we explained in the petition (at 17-18) — and as respondent pointedly does *not* deny — this Court repeatedly has held that state tax laws *cannot* be invalidated on semantic grounds that have "no relationship to economic realities." *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977). The Court in *Complete Auto* therefore rejected precisely the argument now advanced by respondent, holding that the possibility of saving a tax by changing its name does not justify "a focus on formalism that merely obscures the question whether the tax produces a forbidden

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[3] The conclusion that state and tribal interests need not be rebalanced "in every case" hardly means that *all* state taxes falling on tribes are invalid in *all* circumstances. That there is no need to balance interests when a personal income tax falls on a reservation Indian's income from reservation sources, for example, does not suggest that balancing is inapplicable in the very different circumstances of this case.

effect." *Id.* at 288. Respondent offers absolutely no response to this authority.

Second, the holding below is of great practical significance even if the State may save the tax prospectively by (for example) declaring it to fall on the consumer's "privilege" of using motor fuel. We explain in the petition (at 17-18) — and respondent again does *not* deny — that in such circumstances Indian sovereign immunity would preclude the collection of forgone tax revenue. Moreover, as *amicus* PMAA demonstrates (at Br. 4-5), changing the legal incidence of the tax would not solve the State's problem, because tribes could chase the tax exemption up the distribution chain by the simple expedient of becoming distributors (or even, if need be, refiners).

This prospect of manipulation also belies respondent's argument (Br. in Opp. 5-6 & n.5) that the question here is unimportant because other state fuel tax statutes are not identical to Oklahoma's. Some of the tax statutes cited by respondent place the legal incidence on the distributor; in those jurisdictions, the decision below gives tribes a blueprint for obtaining tax immunity by chasing the legal incidence. In others, as in Oklahoma, the statutes simply indicate who is to pay the tax to the State without expressly declaring the legal incidence (in Oklahoma, of course, the statute requires remittance of tax by the distributor, not the retailer); in those jurisdictions, the statutory ambiguities will foment litigation. In all jurisdictions, then, the rule announced below will be significant and destructive.

Third, the importance of the exemption granted respondent is vastly compounded by the virtual certainty that Oklahoma's tribes (and those in other States that follow respondent's lead) will market their tax exemptions by undercutting non-Indian retailers. Respondent declares that it "cannot even imagine a *conceivable* motivation" for tribes not to enact their own fuel taxes in amounts equivalent to Oklahoma's. Br. in Opp. 25 n.13 (emphasis in original). In fact, however, this Court's experience (in *Dept. of Taxation and Finance* v. *Milhelm Attea & Bros.*, 114 S. Ct. 2028 (1994), *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), and *Moe*, among other cases) makes clear that tribes *invariably* market their tax exemptions, for

a perfectly logical and legitimate reason: doing so maximizes revenue. And as PMAA demonstrates (at Br. 11-12), such a development would play havoc with the intensely competitive fuel markets in Oklahoma and other states. It also would vastly diminish state tax revenue. For all of these reasons, review of the decision below is imperative.

B. The Incidence of Oklahoma's Fuel Tax Falls on the Consumer

The Tribe's contention that review is not warranted to determine where the legal incidence of the fuel tax falls is directed largely at a straw man.[4] We do not contend, as respondent suggests (Br. in Opp. 13-15), that *California State Board of Equalization* v. *Chemehuevi Indian Tribe*, 474 U.S. 9 (1985), stated an absolute rule placing the legal incidence of every state transaction tax on the ultimate consumer. But that decision *does* stand for the proposition that the Court will intervene when a court of appeals manifestly misinterprets a significant state tax law in a manner that renders it invalid. That is the case here.

We demonstrated in the petition (at 20-22) that a definitional provision of Oklahoma law refers to the collection of taxes by a distributor or *retailer*, indicating that both collect the tax from someone further down the distribution chain. Another provision declares that consumers using fuel for agricultural purposes may purchase it "without paying the tax," again indicating that it is the consumer who ordinarily is expected to pay the tax. The Tribe's response to these points is telling. It does not contest our interpretation of these provisions; instead, it dismisses the statutory language as "colloquialisms" that do not "accurate[ly]" state the

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[4] The Tribe is wrong in contending (Br. in Opp. 16) that petitioner previously has stated the legal incidence of the tax to fall upon the distributor. Petitioner certainly did inform the court of appeals — as the statute expressly provides — that "motor fuel distributors are required to report and remit the tax on fuel sold to retailers." CA Br. 10. But petitioner immediately went on to add that "[t]he retailer's wholesale price will include the motor fuel taxes which are in turn included in the retail price at the pump." *Ibid.* Petitioner has *never* suggested that the wholesaler bears the legal incidence of the fuel tax.

meaning of the levy. Br. in Opp. 19. We take this extraordinary contention — that the statutory text should be ignored because it is not "accurate" — as an implicit concession that the holding below cannot be squared with the plain terms of the statute.

Respondent's other contentions take it no further. Thus, the Tribe maintains (Br. in Opp. 20-21) that the existence of exemptions to the tax does not establish the levy as one on consumers. But the important point, of course, is that the particular exemptions available in Oklahoma turn on the *consumer's* use of the fuel — and that the obligation to pay the tax is placed upon a *consumer* who uses the fuel in a manner inconsistent with the exemptions. Respondent makes no attempt to explain away these provisions. Instead, respondent relies (Br. in Opp. 17-18) upon elements of the statute indicating that distributors remit the tax on behalf of retailers and relieving distributors of the obligation to remit uncollectible taxes.[5] As we explained in the petition, however (at 20), these provisions demonstrate only that distributors do not pay the tax on their own behalf; they say nothing about who further down the distribution chain is intended to bear the ultimate legal incidence of the levy. Respondent therefore has failed to refute our submission that the court of appeals plainly erred in its placement of the fuel tax's legal incidence, and therefore in its invalidation of a significant state tax as it applies to a large category of taxpayers.

C. Oklahoma's Income Tax May be Applied to Tribal Members Who Live Outside of Indian Country

We agree with respondent that the court of appeals, in holding Oklahoma's income tax invalid as applied to tribal members who earn income on trust land but who live outside of Indian country, purported to rely on the federal treaty with the Chickasaw Nation

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[5] Respondent also observes (Br. in Opp. 18) that the statute does not in terms tax the use, gift, possession, or consumption of fuel and does not place a payment obligation on persons possessing untaxed fuel. But in contrast to cigarette stamp taxes, which are respondent's point of reference, there is an obvious enforceability problem in determining whether a particular gallon of gasoline in an automobile's fuel tank has been taxed. Cf. *Milhelm Attea*, 114 S. Ct. at 2031.

rather than on more general principles of federal law. But respondent plainly misstates the meaning of the court's holding regarding that treaty. Focusing on language providing that no State "shall ever have a right to pass laws for the government of the [Chickasaw] Nation of Red People and their descendants," respondent suggests that the court read the treaty to proscribe state laws that regulate the *tribal government*. See Br. in Opp. 9, 27-29. Respondent therefore reports that the court invalidated the tax because, as applied to employees of the tribal government, it "increase[d] the costs to and reduce[d] the efficiency and efficacy of the Chickasaw *government*." *Id.* at 29 (emphasis in original). The Tribe adds that "the only circumstance in which the guarantee that no state shall pass laws for tribal *governments* * * * becomes relevant in the context of state taxation * * * is with respect to member employees of those *governments* who reside outside of Indian country." *Id.* at 9 (emphasis in original).

It is plain from the face of the court of appeals' opinion, however, that the court held nothing of the sort. Instead, it read the treaty to proscribe state laws that *govern* individual members of the Chickasaw Nation. It held: "the Chickasaw treaty explicitly provides that no state would ever be permitted to pass laws for the government of the Chickasaw or their descendants. The crucial question in determining the validity of the income tax under the relevant treaty language is therefore whether the law is one *imposed on the Chickasaw Nation or its descendants*." Pet. App. 30 (emphasis added). See *id.* at 21a ("on its face, the treaty language prohibits the states only from passing laws governing the Tribe and its descendants, not non-members"). The question posed by the court therefore was, not whether the tax fell upon the tribal government, but whether it fell upon individual Chickasaws.[6]

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[6] This is quite clear from the court's analysis. If the court had reasoned that state law is preempted because "[i]mposing the state's income tax on employees of [the tribal] government increases the costs to and reduces the efficiency and efficacy of the Chickasaw government" (Br. in Opp. 29 (emphasis deleted)), it would have held that the tax could not be imposed on non-member employees of the tribal government; in fact, the court held the tax *valid* as applied to such employees. Pet. App. 21a-22a. Indeed, the court of appeals expressly rejected respondent's

Respondent's interest in mischaracterizing the scope of the decision below is understandable. As we explained in the petition (at 27, 28-29), the court of appeals' actual holding is extraordinarily broad: if correct, it seemingly would preclude the application of *any* state law to *any* Chickasaw. And the importance of that decision transcends the controversy between the parties here. Respondent itself acknowledges (Br. in Opp. 28) that identical language appears in treaties with three other tribes (the Chocktaw, Creek, and Seminole). We noted in the petition (at 28) that very similar language recurs in many additional treaties across the nation. Review of the decision below therefore plainly is in order.

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DAVID HUDSON
General Counsel
DAVID ALLEN MILEY
Assistant General Counsel
Oklahoma Tax Commission
Post Office Box 53248
Oklahoma City, OK 73152
(415) 521-3141

CHARLES ROTHFELD*
GARY A. WINTERS
Mayer, Brown & Platt
Suite 6500
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 788-0616

* *Counsel of Record*

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understanding of the treaty, holding that "[s]ince the income tax is not a tax on the source of the income, it does not impose any burden on the tribal government." *Id.* at 22a.